Supreme Court, U.S.
FILED
MAY 13 1980
MICHAEL RODAK, JR., CLERK

No. 79-1699

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

HAWAIIAN TELEPHONE COMPANY,
and
HAWAII EMPLOYERS COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES, and CHAMBER OF COMMERCE OF HAWAII,

Petitioners,

vs.

STATE OF HAWAII DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, ROBERT K. HASEGAWA, THOMAS S. BROWN,
and
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 1357, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 1260, and HAWAII STATE FEDERATION OF LABOR, AFL-CIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Joint Brief for Respondents in Opposition

WAYNE MINAMI
Attorney General
State of Hawaii

FRANK YAP, JR.
Deputy Attorney General
Department of Labor & Industrial Relations
State of Hawaii
825 Mililani Street
Honolulu, Hawaii 96813
Attorneys for Defendants-Appellants

HERBERT TAKAHASHI
900 Fort Street Mall
Suite 300
Honolulu, Hawaii 96813

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20005

MARSHA BERZON
177 Post Street, Suite 700
San Francisco, CA 94108
Attorneys for Defendants-Intervenors-Appellants

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105
193

INDEX

	Page
Introduction	1
Argument	3
I. The Claimed Circuit Conflict Is Entirely Specious	3
II. This Court Has Already Twice Decided the Determinative Issue in This Case	5
Conclusion	10

TABLE OF AUTHORITIES

CASES

	Pages
Albuquerque-Phoenix Express, Inc. v. Employment Security Commission, 88 N.M. 596, 544 P.2d 1161	4
Dow Chemical Co. v. Taylor, 428 F. Supp. 86	4
Hicks v. Miranda, 422 U.S. 332	5
Kimbell v. Employment Security Comm. of New Mexico, 429 U.S. 804	passim
Mandel v. Bradley, 432 U.S. 173	4, 5
Meadow Gold Dairies v. Wiig, 55 Haw. 225, 437 P.2d 317	4
National Gypsum Co. v. Louisiana Dept. of Employment Security, 313 S. 2d 230 (La. Sup. Ct.)	6
New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519	passim
Ohio Bureau of Employment Service v. Hodory, 431 U.S. 471	6, 7
Super Tire Engineering Corp. v. McCorkle, 550 F.2d 903, cert. denied 434 U.S. 827, rhg. denied 434 U.S. 1025	3, 4

CONSTITUTIONAL PROVISIONS AND STATUTES

Hawaii Revised Statutes	
§ 383-29(2)	9
§ 383-29(3)	9
§ 383-30(4)	4
§ 386-65	9
§ 386-68	9
New Mexico Unemployment Compensation Law, § 59-9-5(d), N.M. Stat. Ann (1974)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1699

HAWAIIAN TELEPHONE COMPANY,
and
HAWAII EMPLOYERS COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES, and CHAMBER OF COMMERCE OF HAWAII,
Petitioners,

vs.

STATE OF HAWAII DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, ROBERT K. HASEGAWA, THOMAS S. BROWN,
and
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 1357, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 1260, and HAWAII STATE FEDERATION OF LABOR, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Joint Brief for Respondents in Opposition

INTRODUCTION

There is one significant omission from Petitioners' Statement of the Case: It fails to note that this is the *second* petition for a writ of certiorari Petitioners have filed in this case. The first Petition (No. 77-962) was filed prior to the decision in the Ninth Circuit, on the same day the petition for writ of certiorari was filed in *New York Telephone Co. v. New York Department of Labor*. 440 U.S. 519. That

petition stressed the identity of issues between this case and *New York Telephone:*

> The sole question presented for resolution by the AFL-CIO to the Ninth Circuit is a variant of the pivotal question in *New York Telephone, supra, i.e.,* "Did Congress determine to permit states to pay unemployment insurance benefits to strikers if they so choose?" Since [*New York Telephone*] involves essentially the same issue and merits resolution by this Court, Petitioners should be afforded full participation when that conflict is resolved.
>
> (Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, No. 77-962, p. 13).[1]

This Court, in *New York Telephone,* granted certiorari and determined that Congress did intend to permit New York to pay unemployment benefits to strikers if it so chose, even if there was an impact upon the balance of economic power in labor disputes. Petitioners consequently now deny what they had earlier stressed—that the determinative issue in *New York Telephone* and this case is the same. Instead, they seek vigorously to discover distinctions between Hawaii's statute and that upheld in *New York Telephone* which would somehow justify a different result in this case. (Petition, p. 9).

Similarly, Petitioner Chamber of Commerce earlier was quite aware that *Kimbell v. Employment Security Comm.*

---

1. *See also* Brief *Amici Curiae* on behalf of (*inter alia*) Hawaiian Telephone Co., the Chamber of Commerce of Hawaii and Hawaii Employer's Council in *New York Telephone,* No. 77-961, p. 5:

> Although each state system differs, the ultimate impact of the payments made during the . . . Hawaiian Telephone . . . [strike] closely resembles the impact found in the case at bar. Thus, the question before the Court—whether the availability of state unemployment benefits to striking employees intrudes into an area left by Congress to the "free play of economic forces . . ."—is a question of great significance to Amici.

of New Mexico, 429 U.S. 804, involved a law "in all material respects, virtually identical" to Hawaii's statute and presented "the same generic issue" as this case. See Brief for the Chamber of Commerce as *Amicus Curiae,* No. 75-1452, p. 2. Now, however, Petitioners insist that "the instant case [is] wholly inapposite to *Kimbell.*" (Petition, p. 7).

In fact, Petitioners' original perceptions were correct: The determinative issue in this case *is* the same as that in *New York Telephone,* and *Kimbell is* identical to this case in all material respects. Thus, there are not one but two recent decisions of this Court squarely controlling, and there is no reason whatever for this Court to address the issue of the legality of unemployment insurance for strikers once again.

ARGUMENT

I. The Claimed Circuit Conflict Is Entirely Specious.

Petitioners contend that federal courts of appeal have differed upon the import of the summary affirmance in *Kimbell, Inc. v. Employment Security Comm.,* 429 U.S. 804, citing *New York Telephone Co. v. New York Dept. of Labor,* 566 F.2d 388 and *Super Tire Engineering Corp. v. McCorkle,* 550 F.2d 903, cert. denied 434 U.S. 827, rhg. denied 434 U.S. 1025. The short but complete answer to this contention is that the *result* in all three cases was the same —*viz.,* a rejection of the plaintiffs' attack on public assistance to strikers: in this case and in *Super Tire* on the authority of *Kimbell;* in *New York Telephone* on the basis of comprehensive *de novo* analysis of the legislative material. Thus, in terms of the substantive rule announced, the three decisions are entirely consistent.

Moreover, contrary to Petitioners' claim, the reasoning of *New York Telephone* and of the decision below is also

consistent.[2] The Second Circuit in *New York Telephone* faced the problem of determining the application of *Kimbell* to a case involving a statute different from the New Mexico statute in *Kimbell*.[3] Thus, the question before the Second Circuit was not whether *Kimbell* is binding at all, but whether it could have been decided upon grounds not applicable to the somewhat different New York statute. *Mandel v. Bradley,* 432 U.S. 173, 177.

Kimbell and this case, however, concern statutes precisely the same both in wording[4] and in construction.[5] Thus, even if the result in *Kimbell* was directly dependent on the specific provisions of the New Mexico statute[6] it "necessarily decided" (*Mandel v. Bradley, supra,* 432 U.S. at 176) the validity of Hawaii's identical statute. This case and *New York Telephone* are each therefore entirely consistent with

2. *New York Telephone* and *Super Tire* may indeed be in tension on their reasoning, although not in their result, since both involved statutes different from the statute in *Kimbell.* This Court, however, declined an invitation to review *Super Tire* because of this disagreement. *See* Petition for Rehearing, No. 76-1684, pp. 2-4. A difference between two other courts of appeal on a question not involved here obviously cannot constitute a justification for review in this case.

3. The New York statute provided benefits after eight weeks regardless of whether the strike succeeded in closing the employer's business. *New York Telephone, supra,* 440 U.S. at 523.

4. Both the New Mexico and the Hawaii statute disqualify applicants for unemployment "[f]or any week with respect to which . . . his unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed. . . ." New Mexico Unemployment Compensation Law, § 59-9-5(d), N.M. Stat. Ann. (1974); Hawaii Revised Statutes § 383-30(4).

5. *See Albuquerque-Phoenix Express, Inc. v. Employment Security Comm'n,* 88 N.M. 596, 544 P.2d 1161, 1165-1166; *Meadow Gold Dairies v. Wiig,* 55 Haw. 225, 437 P.2d 317.

6. *See New York Telephone,* 566 F.2d at 391, n.2, relying upon *Dow Chemical Co. v. Taylor,* 428 F. Supp. 86. *Dow Chemical,* 428 F. Supp. at 91, discussed at length the reasons why *Kimbell,* as a summary affirmance, might be limited to the New Mexico/Hawaii variant of benefits for strikers.

both *Hicks v. Miranda,* 422 U.S. 332 and *Mandel* in their approach to the summary affirmance in *Kimbell,* and there is no conflict between them.

II. This Court Has Already Twice Decided the Determinative Issue in This Case.

1. Petitioners would put *Kimbell* aside on the ground that the decision resulted from inadequate evidence that New Mexico's unemployment system had an actual impact upon collective bargaining. (Petition, pp. 8-9). But, the Court in *Kimbell* necessarily decided that *whatever* the effect of New Mexico's payment of unemployment compensation upon collective bargaining, Congress did not intend to preempt the state law.[7]

When invited by the Court in *Kimbell* to express its views, the United States declared:

> "In our view [a] remand [to factually determine impact upon collective bargaining is] unnecessary because the legislative history is not ambiguous as to Congress' lack of pre-emptive intent . . . [Since] [i]n *Hawaiian Telephone Company* . . ., the district court . . . also found the legislative intent to be unclear . . . [f]or the reasons stated above, we believe that decision to be erroneous."
>
> Memorandum for the United States, No. 75-1452, p. 5.

The United States therefore urged that "the appeal should be dismissed for want of a substantial federal question." *Id.,* p. 11.

7. While New Mexico did defend the *Kimbell* decision in part on the ground that " 'the labor dispute had been settled before . . . [it was] decided that the striking complainants were entitled to any unemployment benefits' " (see Petition, p. 8), that fact cannot possibly serve to distinguish this case. For here, the inquiry into the availability of benefits did not even begin until after the strike had ended (Pet. App. A2, A14) and it has not to this day been determined whether any claimants will collect benefits due to the 1974 Hawaiian Telephone strike. (Pet. App. A3, A54-55).

In response, one of the present petitioners, the Chamber of Commerce of the United States, specifically noted in its brief the evidentiary record in the present case, and concluded that if *Kimbell* were not summarily reversed, this Court "should not foreclose subsequent determinations in the pending cases where the issue is more completely and less abstractly presented." Brief for the Chamber of Commerce as *Amicus Curiae,* No. 75-1452, p. 25. The way to preserve the generic labor preemption question for consideration by those courts was, the Chamber insisted, for this Court to qualify its dismissal in *Kimbell,* as it had done in *National Gypsum Co. v. Louisiana Dept. of Employment Security,* 313 S. 2d 230 (La. Sup. Ct.), *appeal dismissed for want of a properly presented federal question,* 423 U.S. 1009, with the words "for want of a properly presented federal question" or by noting that "the constitutional issue comes to the Court in highly abstract form." Brief for the Chamber of Commerce, *supra,* pp. 25-26.

This Court chose not to indicate in any of these ways that there was a substantial federal question that had been inadequately litigated. Instead, it treated with the question presented[8] on the merits, by dismissing "for want of a substantial federal question."

2. Petitioners seek also to avoid *Kimbell* on the ground that "the doctrinal developments articulated by this Court in *Ohio Bureau of Employment Service v. Hodory* [431 U.S. 471, 475 n.3] and in [*New York Telephone, supra*]" (Petition, p. 9) have obliterated *Kimbell* as binding upon

8. The question presented in *Kimbell* was:
Does the grant of unemployment compensation benefits to strikers by the State of New Mexico contravene the Supremacy Clause of Article VI of the Constitution of the United States by disrupting the operation of federal labor policy requiring state neutrality in the collective bargaining process?
(Jurisdictional Statement, No. 75-1452, p. 4).

the lower courts. But, the express statement in *Hodory* that the Court was not deciding any pre-emption question[9] is surely not a "doctrinal development." And the "doctrinal development" in *New York Telephone* reinforced rather than undermined *Kimbell:* it made clear that Congressional approval of payment of unemployment benefits to strikers was not limited to the New Mexico/Hawaii variant, which renders benefits uncertain because based on an occurrence beyond the strikers' control, but extended as well to the New York statute, which *guarantees* benefits after eight weeks on strike.

The three separate opinions for the six-Justice majority in *New York Telephone* differ on certain theoretical questions concerning labor law preemption as applied to state benefit programs generally. In identifying the key question in *New York Telephone,* however, and in resolving that question, there was complete unanimity among the six Justices who voted to uphold New York's law. All six agreed that the central issue was "whether the National Labor Relations Act . . . implicitly prohibits . . . paying unemployment compensation to strikers." (440 U.S. at 522 (plurality opinion)). None viewed the issue as limited to whether the *particular* way in which New York has determined to pay strikers—by postponing benefits for eight weeks—was approved by Congress. And, the conclusion reached by the majority was similarly general: Congress not only failed to forbid payment to strikers but on "the question of paying benefits to strikers . . . chose . . . to leave *this aspect* of

9. In *Hodory,* the Court said: "At no point in this litigation has appellee claimed that § 4141.29(D)(1)(a) conflicts with or is preempted by any provision of the National Labor Relations Act, 29 U.S.C. § 151 et seq. We do not today consider or decide the relationship between that Act and a statute such as § 4141.29 (D)(1)(a)." (431 U.S. 471, 475 n.3).

unemployment eligibility to the States."[10] (440 U.S. at 545 (plurality opinion, emphasis added).) The plurality added:

> Undeniably, Congress was aware of the possible impact of unemployment compensation on the bargaining process. The omission of any direction concerning payment to strikers in either the National Labor Relations Act or the Social Security Act implies that Congress intended that the States be free to authorize, or to prohibit, such payments. (440 U.S. at 544.)[11]

Justices Blackmun and Marshall subscribed completely to "that portion of Part III of the Court's opinion, where the conclusion is reached that Congress has made its decision to *permit a State to pay unemployment benefits to strikers.*" (*Id.* at 547, emphasis added.) And, Justice Brennan concurred in Justice Blackmun's conclusion in that regard. (*Id.* at 546-547).[12]

Thus, *New York Telephone* did not hold, as Petitioners would have it, that Congress permitted states only the exceedingly narrow choice between the precise terms of the New York statute and a flat prohibition upon unemploy-

10. *See also id.* at 540: "Congress [did not intend] to deny the States the power to provide unemployment benefits for strikers. . . . [Rather] Congress intended the States to *make this policy determination for themselves.*" (Emphasis supplied). Further, the entire legislative history discussion in *New York Telephone* concerns not the specific time duration variant enacted in New York but generally, "the subject of benefits for strikers" (*id.* at 541), or "the issue of public benefits for strikers" (*id.* at 542).

11. The three dissenting Justices as well were quite clear about the scope of the majority's holding: "[T]he Court indicates that the Social Security Act gives the States *complete control over this aspect* of their unemployment compensation programs." (440 U.S. at 565, emphasis added).

12. As the broad language quoted in the text indicates, the "some other preemption case" (440 U.S. at 549) which concerned Justices Blackmun, Marshall and Brennan was not simply another variant upon paying unemployment benefits to strikers. Rather, the three concurring Justices were seemingly concerned with labor law preemption of benefit programs other than unemployment compensation, and, as well, of unemployment benefit provisions not involving payment of benefits to strikers.

ment benefits to strikers. Rather, the Court in *New York Telephone,* quite aware that payment of benefits to strikers ". . . has altered the balance of economic power between labor and management," (440 U.S. at 531 (plurality opinion); *see also id.* at 547 (Blackmun, J., concurring)), held that the Congressional intent was to leave to the states the entire issue of whether and on what conditions strikers should receive benefits.[13] The purported differences between Hawaii's statute and New York's (Petition at 9) therefore would be irrelevant even if accurate.[14]

Nor can *New York Telephone* be distinguished as a law "which confers benefits on a broadly defined class of unemployed persons." (Petition, p. 9). The relevance of the distinction between a law of general application and one specifically concerning labor-management relations was rejected

13. The Court was quite cognizant when it decided *New York Telephone* that many states pay strikers under circumstances differing from those in New York. Indeed, both the district court opinion in this case and the summary affirmance in *Kimbell* were cited as illustrative of the predominant variant. (440 U.S. at 534 n. 24 (plurality opinion); *id.* at 556 n. 7 (Powell, J., dissenting)). Yet, there was no suggestion that the more predominant "American rule" (see 440 U.S. at 534 n. 24) might be preempted although the peculiar New York provision is not.

14. In fact, however, all four of the represented differences are incorrect. (a) There was no evidence in this case that Hawaii had ever conducted an investigation of a labor dispute during a strike. (b) Hawaii does *not* waive the "availability" requirement of § 383-29(3), Haw. Rev. Stat., for strikers, nor is there any exception to the requirement that a suitable job offer must be accepted. Hawaii, unlike other states, does not expressly require for *any* claimant an active search for work as a precondition for unemployment benefits. And, while Hawaii does not, to be sure, require strikers to register for work with the employment service, that is because registration for work is waived for all benefit claimants still attached to an employer. (Haw. Rev. Stat. § 383-29(2); Tr. Dec. 13, 1974, pp. 700-701). Thus, strikers in Hawaii are treated similarly to others temporarily out of work. (c) In New York, any striker may collect benefits after eight weeks, whether or not his former job has been filled. (d) Hawaii, like New York (*New York Telephone,* 440 U.S. at 524 n.4), does not necessarily recoup from an employer all benefits paid to his employees. *See* Haw. Rev. Stats. §§ 386-65, 383-68.

by five members of the Court in *New York Telephone.* 440 U.S. at 550 (Blackmun, J., concurring); *id.* at 558 (Powell, J., dissenting)) and questioned by a sixth (*id.* at 546 n. *, Brennan, J., concurring). And, the New York statute, like the Hawaii statute, covers in a special provision the payment of benefits to strikers.[15]

CONCLUSION

Petitioners are seeking nothing less than to relitigate an issue twice decided—in summary fashion in *Kimbell,* and, after extensive briefing and argument, with full opinions in *New York Telephone.* The petition for writ of certiorari should be denied.

Respectfully submitted,

WAYNE MINAMI
Attorney General
State of Hawaii

FRANK YAP, JR.
Deputy Attorney General
Department of Labor &
Industrial Relations
State of Hawaii
825 Mililani Street
Honolulu, Hawaii 96813

Attorneys for Defendants-Appellants

HERBERT TAKAHASHI
900 Fort Street Mall
Suite 300
Honolulu, Hawaii 96813

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20005

MARSHA BERZON
177 Post Street, Suite 700
San Francisco, CA 94108

Attorneys for Defendants-Intervenors-Appellants

---

15. In fact, Petitioners Hawaiian Telephone Co.. Chamber of Commerce of Hawaii, and Hawaiian Employers' Council, in their brief *amici curiae* in *New York Telephone* (at 10-11) specifically attacked the New York statute as "an impermissible special accommodation [because] [t]he receipt of benefits results solely from an employee's status as a striker." (*See also id.* at 21, 31).